TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1928

No. [redacted] 15

BOSTON SAND & GRAVEL COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1927

CERTIORARI GRANTED NOVEMBER 21, 1927

(33,003)

(33,003)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 551

BOSTON SAND & GRAVEL COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 2223. In Admiralty

BOSTON SAND & GRAVEL COMPANY, Libellant,

v.

UNITED STATES OF AMERICA, Respondent

MEMORANDUM AS TO FORMER APPEAL

[Memorandum.—This cause was heretofore appealed by the Boston Sand & Gravel Company, libellant, to the United States Circuit Court of Appeals for the First Circuit, from a final decree entered in this court on the 30th day of July, 1924, and an appeal record was duly certified by the Clerk of the U. S. District Court and entered in said Circuit Court of Appeals at the October Term, 1924, and entitled No. 1826, Boston Sand & Gravel Company, Libellant, Appellant, v. United States of America, Respondent, Appellee, to which record reference is hereby made in lieu of an actual incorporation herein.

James S. Allen, Clerk.]

[fol. 2] IN UNITED STATES DISTRICT COURT

MANDATE, U. S. C. C. A.—Filed September 10, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Whereas, lately in the District Court of the United States for the District of Massachusetts, before you, in a cause numbered and entitled, No. 2223, Civil Docket, Boston Sand & Gravel Company, Libellant, vs. The United States of America, Respondent, the following Final Decree was entered July 30, 1924:

FINAL DECREE—July 30, 1924

LOWELL, J.:

This case came on to be heard at the December Term, 1923. It was argued by counsel, and after mature deliberation thereon had, it is ordered, adjudged and decreed that the libel in the said case be dismissed with cost for the respondent taxed at $147.11.

By the Court.

Arthur M. Brown, Deputy Clerk. (Seal.)

[fol. 3] And whereas said Boston Sand & Gravel Company, Libellant, appealed from said Final Decree to this United States Circuit Court of Appeals for the First Circuit, as by the inspection of the transcript of the record in said cause of the said District Court, which was brought into the United States Circuit Court of Appeals for the First Circuit, by virtue of the aforesaid appeal, agreeably to the act of Congress, in such cases made and provided, fully and at large appears,

And whereas, in the term of October, in the year of our Lord one thousand nine hundred and twenty four, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel;

On consideration whereof, it is now, to wit, July 7, 1925, here ordered, adjudged and decreed as follows: The decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day, with costs to the appellant.

Costs in this United States Circuit Court of Appeals for the First Circuit, to be satisfied under the direction of said District Court in favor of said Boston Sand & Gravel Company, Libellant, Appellant, and against said United States of America, Respondent, Appellee, are taxed at four hundred and twenty eight dollars and forty five cents ($428.45).

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the aforesaid decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable W. H. Taft, Chief Justice of the United States, the tenth day of September, in the year of our Lord one thousand nine hundred and twenty-five.

Arthur F. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit.

[fol. 4] Costs of Appellant:

Clerk	$35 95
Transcript (D. C.)	358 15
C. C. A. Printing Record	13 85
Certificate (D. C.)	50
Attorney	20 00
	$428 45

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 1826

BOSTON SAND AND GRAVEL CO.

v.

UNITED STATES

Bill of Costs

Clerk's fees:	
Docketing case	$5 00
Filing 24 printed copies of record	5 00
Appearances 2 @ 25c; filing 25c	75
Fees on printing	1 75
Calendar	1 00
Assignment 20c; hearing 20c	40
Filing briefs and receipts	5 50
Entering decree $1, filing 25c, recording 20c	1 45
Copy opinion to file $2, filing 25c	2 25
Filing petition for rehearing	25
Order denying rehearing 20c; filing 25c	45
Filing certificate as to costs (D. C.)	25
Filing bill of costs 25c; copy for mandate 20c	45
[fol. 5] Mandate $5, copy to file $1, filing 25c	6 25

Certified copy opinion for mandate	4 00
Minuting issuing of mandate	20
Clerk's fees including mandate	35 95
Transcript and printing (D. C.)	358 15
Printing (C. C. A.)	13 85
Certificate as to costs (D. C.)	50
Attorney Docket fee	20 00
	$428 45

In United States District Court

Opinion of the U. S. Circuit Court of Appeals Accompanying Mandate—July 7, 1925

Before Bingham, Johnson, and Anderson, JJ.

Bingham, J.:

This is an appeal from a decree of the federal District Court for Massachusetts in an admiralty proceeding brought by the Boston Sand & Gravel Company, the owner of the steamer Cornelia, against the United States, under a special Act of Congress approved May 5, 1922, to recover damages sustained by the Cornelia in collision with the destroyer Bell in the dredged channel of Broad Sound at the entrance to Boston Harbor, August 9, 1918.

The court below entered a decree dismissing the bill and the libellant appealed.

The Cornelia was a steam sand lighter, 130 feet long and 30.5 feet beam. At the time of the collision she was proceeding light from Boston to Scituate, at about 4½ knots, to obtain a cargo of sand and gravel. There was a thick [fol. 6] fog restricting one's view to from 50 to 75 yards. The Bell was 314 feet long and 31 feet in width. Her bridge was 225 feet from her stern and she was painted in camouflage colors.

On the morning in question both vessels were proceeding out of the harbor intending to go through the north channel. At that time, for war purposes, a steel submarine net, about 500 feet long, having a gate 100 feet wide, had been

stretched across this channel. The gate swung on buoys at the left side of the channel as one passed out to sea. In the day time it was kept open, being moored at right angles to the net. The net and gate were submerged, but their location was marked by buoys. A vessel desiring to go out of the harbor was required to receive permission from a station ship anchored off Deer Island Light, about a mile from the net.

As the vessels approached Deer Island Light the Bell passed the Cornelia on her starboard side some 150 feet distant and obtained permission to go through the net a few minutes before the Cornelia did. When the Bell passed the Cornelia the fog had lifted somewhat and each knew and appreciated that the other was outward bound through the net, and the Bell was aware that the Cornelia was proceeding at a slightly slower speed than she was. When the Bell came within sight of the net the gate appeared to be closed and her officers caused her engines to be reversed. The Bell stopped and remained so for two minutes when her lookout on the bridge sighted the Cornelia. About three minutes elapsed from the time the net was sighted until the Cornelia was seen. She was first seen on the port quarter of the Bell by the lookout on the port wing of the Bell's bridge, who was stationed about 215 feet from her stern. Immediately on observing the Cornelia the Bell signalled for standard speed ahead. Two men were stationed on the Bell's fan tail, about 20 to 30 feet from her stern. It was undisputed that the duties of these men were to attend to the depth charge and to look out for sub- [fol. 7] marines. There was a dispute, however, whether they were to observe and report vessels generally. They made no such reports that morning on the way out. Both vessels claim to have given the proper fog signals, though neither heard the other. On the stern of the Bell was a depth charge sponson extending out under the water some 15 or 20 feet.

When the Cornelia sighted the Bell they were from 75 to 120 feet apart. She then ported and turned her bow to starboard and in doing so struck the depth charge sponson, which cut her open and made it necessary to beach her. The sponson of the Bell was broken and she received other damage.

The District Court found that the Bell was at rest at the time of the accident and was free from fault; that the Cornelia was at fault, apparently because she failed to so regulate her speed in the fog that she could stop after first seeing the Bell.

We think that the District Court erred in finding that the Bell was free from fault. There can be no question that the Bell knew the Cornelia was following her out through the net only a short distance behind; that she knew the passage was a narrow one; and that in stopping in the fog as she approached the gateway she was creating a dangerous situation which called for special care and caution, particularly with reference to the Cornelia. Being aware of these facts she failed to station anyone at her stern to observe and report the approach of the Cornelia or to instruct the men on the fan tail (the depth bomb men) to observe and report the approach of the Cornelia. The evidence further showed that had the Bell been ten feet in advance of the position she was in at the time the Cornelia crossed her stern no accident would have occurred.

It is therefore evident that time was of the essence, and had the approach of the Cornelia been reported to the Bell but a short time earlier the accident would not have oc- [fol. 8] curred. All the witnesses for the libellant testified that had the Bell stationed a lookout at her stern the Cornelia's approach would have been sooner observed; and two of the officers of the Bell testified that with a lookout the approach of the Cornelia would undoubtedly have been seen sooner than she was by the lookout on the bridge. We think the Bell was guilty of contributory fault. The damages to the vessels should be divided.

The decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the appellant.

A true copy.

Attest:

Arthur F. Charron, Clerk. (Seal.)

In United States District Court

Interlocutory Decree on Mandate—November 10, 1925

Brewster, J.:

A mandate having been received from the Circuit Court of Appeals in said cause and entered, reversing the final decree in this court entered on July 30, 1924, with costs in the Circuit Court of Appeals to the appellant, and this case having been heard on the pleadings and proofs and having been argued and submitted by the proctors for the respective parties, and the court on consideration thereof [fol. 9] having found as stated in its opinion dated July 7, 1925, that damages of the libellant, Boston Sand & Gravel Company, were caused by the fault of both the libellant and the respondent, it is therefore

Ordered, Adjudged and Decreed

that the libellant recover from the claimant one-half its damages and one-half its costs together with full costs in the Circuit Court of Appeals, and that said cause may be referred to Fitz Henry Smith, Jr., Esq., as commissioner to determine the amount of said damages and report thereon to this court with all convenient speed.

By the Court, Frank H. Mason, Deputy Clerk.

In United States District Court

Report of Commissioner

Filed September 20, 1926

By Interlocutory Decree on Mandate, dated Nov. 10, 1925, it was ordered that the libellant recover from the claimant one-half its damages and one-half its costs, together with full costs in the Circuit Court of Appeals, and that the cause be referred to me as Commissioner to determine the amount of said damages and report thereon to the Court.

[fol. 10] Statement of the Case

The libel was for damages alleged to have been sustained by the libellant as owner of the steam lighter "Cornelia" from a collision of the lighter with the United States destroyer "Bell" in Broad Sound Channel, Boston Harbor, Aug. 9, 1918. It was brought by virtue of an Act of Congress approved May 15, 1922, which provided that the claim of the owner might be submitted to the United States District Court for the District of Massachusetts "under and in compliance with the rules of said Court sitting as a Court of Admiralty and that said Court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs in like cases in admiralty between private parties with the same rights of appeal."

Pursuant to the order appointing me, I met the parties, heard their evidence, examined their exhibits and vouchers, and listened to the arguments of counsel, and now, after careful consideration, report to the Court.

The port bow of the "Cornelia" struck the starboard quarter of the "Bell," injuring the lighter so as to cause her to leak badly, and she was thereupon beached and subsequently disposed of as hereinafter related.

I find that the libellant, Boston Sand & Gravel Co., is a corporation engaged in the business of producing and selling sand and gravel in Boston and vicinity, having property and a plant at Scituate, Mass., where the material is obtained and transported therefrom by water, about 75 per cent of the shipments being to Boston and the balance to places on the north shore beyond Marblehead. For the means of transporting the material the Company had, in [fol. 11] 1918, a fleet of six steam lighters, so called, one of which was the "Cornelia."

The "Cornelia" was a vessel of 285 gross and 163 net tons, 128 feet long, 30.9 beam, and 9.1 deep, with a total cargo capacity of 450 tons. She was built of wood, at Noank, Conn., in 1908, and was of heavy construction. She had twin screws, and her propelling machinery consisted

of two fore and aft compound condensing engines, the cylinders being 11 inches and 26 inches, the stroke 1 foot, 6 inches, and the estimated horse power 400. She had circulating and other auxiliary pumps and two main boilers 9 feet, 6 inches long by 72 inches in diameter, marine type, built at Oswego, N. Y. in 1906, and was allowed a steam pressure of 125 pounds. And she had one furnace for each boiler, 6 feet, 6 inches by 5 feet, with an aggregate surface of about 33 square feet.

The lighter was purchased by the libellant July 14, 1915, for $17,500.35, and was immediately altered to fit her for the uses of the Company. The alterations included the installation of steam steering gear, a Ledgerwood hoisting engine with 4 drums, a 65 foot mast with a 60 foot boom and gear for a 2 ton clam shell bucket, and the construction of two open wells holding 190 tons of cargo, and a cabin with a galley for a crew of 10 men.

The total cost of the alterations was $8,230.30, and the vessel was carried on the books of the Company at $25,000, the round figures of her cost to the Company. She was insured with the Boston Insurance Company Mar. 18, 1916 for $30,000.

As altered, the appearance of the "Cornelia" was that of a large tow boat, but with engine, stack and superstructure aft, and a large mast and boom in the bow for the handling of the cargo which was carried amidships. When loaded she was low in the water. Both vessels were bound out at the time of the collision, and the "Cornelia" was then light.

[fol. 12] The collision took place about 8 o'clock on the morning of Aug. 9, 1918, and the lighter was beached on Fawn Bar outside of Deer Island, where the tide overflowed her. She lay about northeast, southwest, with her stern to the southwest.

Attempts to Raise the "Cornelia"

The libellant was notified of the accident and a tug was engaged, and Mr. Maxwell, the President of the Company, since deceased, Mr. Bird, a consulting engineer then in the employ of the Company and later its President, and Charles

E. Rowe, the marine superintendent of the Company in charge of the upkeep of its fleet, went down to the "Cornelia." Mr. Rowe thought that she could be floated easily, and they returned to Boston. Rowe engaged Betts Bros. to put a patch on the bow of the lighter, where she was stove in by the collision, hired an 8-inch pump from the T. A. Scott Co. and went back to the stranded vessel in the lighter "Reliance" belonging to the libellant, and reached the scene of the wreck the evening of Aug. 9 at about low water. The main deck of the vessel was then some 2 or 3 inches out of water, and she was so constructed that at both ends the decks were about 2 feet higher than the main deck. The hatch combings amidships were built up about 3 feet above the main deck.

Rowe ran the "Reliance" alongside the lighter and put a hose down the forward companionway, explaining that he did this in order to reach the water in the bottom inasmuch as the wells were practically watertight and if placed there the hose would only have exhausted the water that was in the well. He started the pump and after running it some two hours succeeded in lowering the surface perhaps two inches, and it was found that the water was coming through the top sides of the vessel, which, ordinarily out of water, [fol. 13] were submerged as she lay aground and leaking from the pressure of the sea against them.

Rowe accordingly stopped the work but still thought that the lighter could be saved, and he returned the next morning, Aug. 10th, intending to try again to pump her out. He found on arriving that the wind had turned east and that a sea was running, which, with the vessel held down at the stern by the weight of her engines, caused the forward end to move up and down 20 inches or more. Parts of the after house were washing away, and it seemed to him that the vessel was pulling apart amidships, and as the bottom was covered with boulders he came to the conclusion that she would be damaged more than she would be worth to repair. So he gave up the attempt to save her and returned to Boston and advised Mr. Maxwell that it was not a good business proposition to undertake to raise the vessel.

Meanwhile, a special agent of the Boston Insurance Co., Mr. Veazie, working under Mr. Henry R. Hedge, the Vice President of the Company and in charge of marine losses,

had conferred with the officers of the libellant. He was advised of the results of Rowe's attempt to pump the lighter and of the situation of the vessel, and engaged a diver to make an examination of the hull. Veazie went down the harbor with the diver, who made him a verbal report and also submitted a written report to the Insurance Company. The diver did not testify, as he was absent from the district and could not be located, but his report was admitted in evidence as what he stated to the Insurance Company and upon which the Company acted.

[fol. 14] The diver's report was dated Aug. 16, and read as follows:—(Libellant's Exhibit 4)

"On August 12, 1918, I made an examination of the S. S. Cornelia ashore at Deer Island, Boston, Mass. and found conditions to be as follows: I found two holes on the Port side forward of the rigging one above the other. The top hole measures about five feet long and about a foot across, and the other a few feet below this hole is about two planks wide and four frames long. The bottom of the bay at this point is full of boulders of various sizes all the way from the size of a water pail up to one on the Port side midship about eight foot on the base and about six or seven feet high. The vessel is buried up to the ice sheathing in gravel, boulders and sand forward and aft the same up to about the bottom of the propellers. The vessel being buried this way I was unable to get at the bottom to find out to what extent it was damaged, but on going into the after well I found that there was at least three feet of sand and gravel that probably came through the bottom as the material that I brought up as samples is said to be an altogether different kind from that carried by the vessel on August 13 and went into the forward well and found the well was broken on the bottom on the side or end and could feel a current coming through (tide was flooding at the time) the rest of the well outside of this corner was filled with gravel and sand to a point about the Keelson. The vessel now lays on an even keel with about two feet of water over the decks at low tide."

The bottom of the lighter was flat with about 3 inches dead rise and hard bilges.

Veazie also talked with the T. A. Scott Co. and with [fol. 15] Betts about their undertaking to raise the vessel,

but the Scott Co. would not tackle the job on any basis, and Betts did not make any proposition.

I find that the reports of the diver had great weight with the Insurance Company in determining the position which the Company should take—in particular, the statement made both orally and in his written report that there seemed to be a current moving through the vessel and that he found sand in her which was not of the kind that she had been carrying. Veazie conferred with Hedge, who had the ultimate say as to what the Insurance Company would do, and Hedge determined to recognize the vessel as a total loss, and under date of Aug. 13 wrote the libellant as follows: (U. S. Exhibit F).

"Cornelia"

"In view of the condition of this vessel and the difficulties in raising her, we are satisfied that the cost of raising and repairing this boat would exceed the valuation of $30,000.

"Under the circumstances, we are prepared—(1)—to pay you the sum insured, $30,000, taking an assignment of interest in the wreck; or (2) we will pay you the sum of $25,000 in full settlement and release of all claims under the policy, said policy to be surrendered, you to retain ownership in the wreck."

Thereafter, and before the libellant replied to the letter, the Insurance Company employed three surveyors to make a further examination. These surveyors, Oscar G. Eaton, William B. Price and Robert H. Fraser, went aboard the vessel Aug. 20th and then made the following report to the Insurance Company: (U. S. Exhibit G).

(fol. 16) "We, the undersigned, this day examined the Boston Sand & Gravel Lighter Cornelia, ashore at Fawn Bar. This lighter was full of water. The decks were awash at low water. On examination of the hull it showed strain and work around the foremast and at the bulkhead.

"From the situation in which we found her, it is our opinion that the cost of raising and repairing this lighter would be in excess of thirty thousand dollars ($30,000).

There was a suggestion by the libellant that it be allowed $2,500 for and retain the lighter, but nothing came of the

suggestion, and on or about Aug. 20 the officials of the libellant met and discussed the matter and after a conference with the Insurance Company wrote the Insurance Company on the 23rd accepting $30,000 for the loss of the vessel (Libellant's Exhibit 16).

Under date of Aug. 26 an agreement was entered into between the parties, reciting the abandonment of the lighter to the Insurance Company, the acceptance of $30,000 by the assured in full satisfaction of the amount insured by the policy, and assigning all interest in the vessel to the Insurance Company with power to sue and recover in the name of the assured for the damages it had sustained. The agreement also contained an undertaking by the Insurance Company that if it secured "by any means or from any source more than the sum of $30,000, together with interest from date and all costs and expenses, including counsel fees", it would turn over such excess to the assured (U. S. Exhibit E).

About this time, Mr. John I. Snow, of Rockland, Maine, called at the Insurance Company and saw Mr. Veazie. Snow was connected with the I. I. Snow Co., which had a ship repair yard in Rockland, and he personally owned a wrecking outfit, including a tug and steam lighter, some barges, and pumps of various sizes. Veazie told him of the different [fol. 17] wrecks they had and mentioned the "Cornelia". Snow said that he might be interested, and he went down the harbor to see the vessel. He found that the tide was too high for an examination and made another trip the following morning, which he thought was a Wednesday or Thursday and the 27th of August. If material, it appears that the 27th of August was Tuesday.

The tide was low on the second occasion and he went aboard the lighter, walked around the deck, looked her over, and, there being about 10 feet of water where she lay, took a long boat hook and went around the hull and examined the bottom with it. He found that the bottom was composed of coarse gravel intermixed with cobble stones varying in size from stones as big as a man's fist to boulders of perhaps 10 tons. The vessel lay against a big boulder on the port side amidships that was about 7 feet high, and she had been chafing against it.

Whether there were any holes in the hull Snow could not see, but he determined in his own mind what he could get from the vessel in case she could not be pumped, and what he could give for her, feeling that if he could get her whole it would be the cheapest, but if not, he would strip her, which would be more expensive. He said he had to work fast, and he returned to Veazie and offered $5,000 for the vessel, which was accepted, and she was sold to him that day.

Snow then went to Rockland, got his equipment ready and brought it to Boston with his tug and lighter, and Saturday afternoon made fast to the stranded vessel and set up one 8 inch pump. Sunday morning he got a 12 inch and another 8 inch pump set up and all three ready to work. On Monday, which was Labor Day, he obtained a diver and had the vessel patched, and when the patch was completed started the pumps and floated the vessel, and towed her in and beached her on the inside of Deer Island at about dark that night.

[fol. 18] Early the next morning he had a new patch put on, as the vessel lay on the flats at low water, in place of the one made by the diver, and then towed her to Green's ship yard in Boston, where she was later hauled out.

No hole was discovered in the hull other than that caused by the collision, but the keel was gouged and chafed its whole length, and the bottom was so chafed that in some places the planks which were originally 3 inches were only an inch thick, and in one place were reduced to half an inch. The deck was started around the break forward and aft, the house was gutted on the main deck level, and the fittings of the galley were all down. The port propeller shaft was bent about 6 inches and the strut broken, and some of the blades of both propellers were broken at the tips.

The lighter remained at Green's about a week, during which time the hold was cleared of the mess it was in from the submersion, the engines and boilers were cleaned, and the chafed and torn threads cut from the keel and planking, and the butts caulked where they showed signs of leaking. When this was done, she was towed to Rockland, Snow's tug being ahead and his lighter astern, one boiler and the starboard engine of the injured vessel being worked

all that they could be worked, to help on the way down. She leaked on the trip about an inch an hour.

At Rockland the vessel was put on a railway and repaired. She left the railway about Nov. 20, and her boilers were gone over and made tight. The boilers required further attention thereafter, though nothing more serious than welding, but it was two months or more before they were in shape.

Snow figured that it cost him $22,000 to raise and repair the vessel, in addition to the purchase price, but not including insurance or similar charges. (U. S. Exhibit 1) He chartered her for a while to carry sand from the Merrimac [fol. 19] River to Boston, in which work she was engaged for 6 or 7 months, and in December, 1920, sold her for $60,000, out of which he paid a commission of $10,000.

Contention of the United States

It was strenuously argued by counsel for the government that a reasonable effort to raise the "Cornelia" was not made before she was sold, and that she was not worth what it is now claimed that she was worth. And he further contended that all that the libellant was entitled to recover was for the fair cost of salvage and repairs.

It is not to be questioned that a damaged vessel owner must do all that he reasonably can do to minimize the damages. The law upon the subject has been stated at length by the Supreme Court of the United States in the case of

The Baltimore, 8 Wall. 377

That was a case where a schooner was sunk in the channel of a river and the owner was allowed to recover the value of the vessel. The decree was reversed, and, after stating the rule in damage cases to be restitutio in integrum where repairs are practical, and, in case of total loss, the market value of the vessel, if she is of such a class as to have a market value, the Court said, in an opinion by Mr. Justice Clifford: pp. 386 ff,

"Evidence, however, that the injured vessel is sunk is not of itself sufficient to show that the loss was total, nor is it sufficient to justify the master and owner in abandoning the vessel or the cargo unless it appears that the

circumstances were such that the vessel could not be raised and saved or that the cost of raising and repairing her would exceed or equal her value after the repairs were made.

[fol. 20] "Experience shows that in many cases where the injured vessel is sunk especially when the disaster happens in rivers or harbors, the vessel may be raised at moderate expense, and that the cargo, if not perishable, may be saved and restored to the shipper, or carried forward to the port of destination; and the rule in such cases is to award such damages only as will compensate the owners for the loss incurred, which is held to include the expense of raising the vessel and putting her in repair, with a proper allowance for the loss of freight and for the damage to the cargo, and for the detention of the vessel during the time necessary to make the repairs and fit the vessel to resume her voyage.

"Justice as well as sound policy forbids that the owner of a vessel sunk by collision should be allowed to recover the full value of the vessel and cargo except in cases where the entire property is lost by the disaster, which is not true in a case where, by reasonable exertions the vessel may be raised and the cargo saved by the use of such nautical skill as the owners of vessels usually employ in such emergencies. Owners of vessels seeking redress in such cases must be prepared to show, not only that those in charge of the other vessel were in fault, but that no negligence on their part has increased or aggravated the injury. Damages are awarded in such cases for the injury done to the vessel and cargo by a wrongful act, but if the party suffering the injury to his property will not employ any reasonable measures to stop the progress of the damage, but willfully and obstinately, or through gross negligence, suffers the damage to augment, it is his own folly, and the law will not afford him any redress for such part of the damage as proceeded directly from his own culpable default.

[fol. 21] "Persons injured in their property by collision are entitled to full indemnity for their loss, but the respondents are not liable for such damages as might have been reasonably avoided by the exercise of ordinary skill and diligence, after the collision, on the part of those in charge of the injured ship.

"Responsive to these views, the suggestion is, that the libel alleges that the schooner and cargo were sunk in such deep water as to make both a total loss, but the insuperable difficulty in the way of that suggestion is, that the allegation of the libel is expressly denied in the answer, and the libelants failed to introduce any proof to support their allegation. Subsequent to the disaster, several witnesses saw the schooner, and they concur that her masts were some eighteen feet out of water, and that she lay with her stem to the west-northwest, in the exact course in which she was steering when she was sunk by the steamer. Theory of the libellants is, that the vessel and cargo were of no value, but the court cannot adopt that theory in the absence of any proof to warrant the conclusion.

"Decided cases may be found where it is held that the owner of the injured vessel is not bound to raise the vessel in a case where she was sunk by a collision; but it is clear that the court cannot award damages for a total loss, where it appears probable that the vessel and cargo may be raised without much expense, and restored to their owners.

Under the paragraph last quoted the Court cited

The Columbus, 3 W. Rob. 159.

That case dealt with a fishing smack sunk by a collision, where, before proceedings were begun, the owners of the [fol. 22] offending vessel, the Columbus, raised the smack and brought her into port and offered to deliver her to her owners, who paid no attention to the offer. The Columbus was libelled and held solely at fault by the Court, and the Registrar, to whom the case was referred, awarded damages for an entire loss of the smack. It was contended that this was error under the peculiar circumstances of the case, and that the offending owners should only be held liable for the cost of such repairs as might be necessary to put the injured vessel in such condition as she was before the collision.

Dr. Lushington confirmed the report of the Registrar, but confessed that there was difficulty in the case and said, p. 166:

"The rule which I consider it incumbent upon this court to follow, in cases of this description, is this, that if a

vessel is not merely run into and partially damaged, but is actually sunk at sea, it is not incumbent upon the owner of that vessel to go to any expense whatever for the purpose of raising her. I apprehend this to be the true principle; but let me not be misunderstood, that this principle would apply in any case where the vessel is not actually sunk, but is only partially damaged. In the latter case, where there is the slightest chance of bringing the damaged vessel safely into port, the principle, undoubtedly, would not apply."

Referring thereto, the author of Roscoe on Damages says, (2nd Ed., p. 53): "This decision, however, is obviously subject to some qualification, because if an owner can properly decide that his ship is a constructive total loss without raising her it would be certainly imprudent and unreasonable for him to incur this expense." He states further that "to determine whether in a collision action a vessel should be considered as a constructive total loss, all questions of in- [fol. 23] surance and of the respective rights of underwriters and assured must be eliminated, and the prudent uninsured owner only called into requisition;" but he admits that, "this is somewhat difficult in practice, because in nearly every case the facts are complicated by the relationship of assurers and assured." And the complication exists in the case at bar.

The owner must decide, however, whether under all the circumstances the vessel is worth repairing, which involves the consideration, not only of her value and the cost of raising and repairing her, but the length of time it will take to restore her to the condition she was in at the time of the collision. "For as the owner of the injured vessel is bound to minimize his loss, it would be unfair that the wrongdoer should have to pay a substantial sum as damages for detention, if without such payment the plaintiff would be indemnified by recovering the value of his vessel." Roscoe, supra, p. 54.

See the Reno, 134 Fed. 559.

There, the owner of the sunken vessel had her raised and repaired without any survey or apparently any preliminary investigation to ascertain whether she was worth raising and repairing, or what it would cost to remove or repair her.

The expense amounted to more than the value of the vessel, and the Circuit Court of Appeals for the 2nd Circuit held that an award exceeding her value at the time of the loss should not be allowed.

Cf. the Venus, 17 Fed. 935, Addison Brown, J.

where the owner was advised to abandon the vessel as a total loss.

[fol. 24] Finding on Attempts to Raise Vessel

I cannot find that the libellant was negligent or that a reasonable effort to save the "Cornelia" was not made. The action of the owner, it seems to me, must be viewed in the light of the circumstances as presented at the time. That the lighter was in an exposed place on a dangerous bottom and likely to go to pieces in an easterly storm was not controverted. And the collision took place when the country was at war and the conditions unusually, both as to facilities for and the costs of raising and repairing a sunken vessel.

The libellant acted in the premises with promptness, at first through Charles Rowe, and afterwards with the Insurance Company, and there was no evidence of collusion or bad faith. Rowe was libellant's marine superintendent. He had built vessels and had some experience in raising them previously to his connection with the libellant, and the officers of the Company relied upon his experience and judgment. He moved as fast as he could in his attempt to raise the lighter, and explained very clearly his reason for first believing that she could be saved, saying that when he first went down to the vessel the weather was good and he thought it would not change and that they could pump her that night, that she had only laid there during the day and there was no sea that hurt her, she was not moving at all, and it looked as if she could be gotten off easily if they could stop the hole made by the collision. He was subjected to some criticism by counsel for the government because he did not investigate to see if the vessel had been patched before he undertook to pump her out. But he said he was told by Betts that the patch had been put on, and as Betts charged for labor that day (Libellant's Exhibit 10) and the patch was all that he had been asked to attend

to—and as Snow found a patch, I have no doubt that it was made.

[fol. 25] Rowe did not arrive at the opinion that the lighter could not be saved until the next morning when he saw the sea that was running and the movement of the vessel on the bottom. He said that he did not know anything about the insurance and that the insurance was not mentioned when he told the president of the Company that it was not a good business proposition to undertake to save the vessel. He did nothing thereafter with respect to the vessel and what was done was done by the Insurance Company, but the owner conferred with the Insurance Company throughout and Mr. Veazie helped Rowe to obtain the pump that he used.

Counsel for the government criticized Veazie's testimony and he was uncertain as to some of his dates. I think he was mistaken in saying that he met Charles Rowe at the scene of the wreck, as he was obviously mistaken that the Insurance Company relied on the surveyors' report in offering to pay for a total loss of the vessel, since the offer was made on August 13th and the survey not until the 20th. But I was impressed with his evident honesty and the substantial truthfulness of his evidence, and have relied upon it.

The Insurance Company had the lighter examined by a diver and endeavored to have her raised but without success. Libellant's officers were advised of the diver's report and of the failure to get the T. A. Scott Co. or Betts Bros. to undertake salvage operations, and they knew also of the report of the surveyors and had all of this information before them when they decided to accept the offer of the Insurance Company to pay for a total loss. The offer was made by the insurers August 13th, but it was not until the 24th that it was accepted by the owner. And whereas the owner finally abandoned the vessel to the Insurance Company, after considering all the reports, it is to be noted that the agreement (U. S. Exhibit E) bound the Company to pay over any ex- [fol. 26] cess obtained above the amount covered by the policy—indicating that the owner did not then regard the insurance as compensation for the loss of the vessel.

The only wrecking concerns to which the parties could turn in Boston were the Scott Company and Betts Bros., the

former being one of the largest in the business on the Atlantic coast. The surveyors were men of standing and long experience in their profession. While Capt. Eaton was regularly in the employ of the Insurance Company, all three were engaged by the Company on this occasion to make a survey of and report on the vessel. They were not otherwise instructed, and I find that the survey was desired by the Insurance Company that it might have expert advice as to what ought to be done with the vessel and because also it was reinsured for the loss.

The surveyors went aboard with Veazie and examined the lighter at low tide and gave him their unanimous opinion that she was not worth raising and repairing, and later made the written report to the Insurance Company quoted above. Fraser, like the diver, could not be reached, but Captains Eaton and Price testified before me and both said they thought that there were holes in the vessel's bottom.

The Insurance Company, having taken the vessel and paid the insurance, determined to sell her for the $5,000 offered by Mr. Snow, which Mr. Hedge said seemed "like manna from Heaven." Snow testified that his offer was based on the strippings and what he thought he could give for the vessel and take a chance, for, he said, it was inevitable that with a heavy sea the hull would go to pieces against the big boulder. The chance of raising her he regarded as a "fifty fifty" proposition. Mr. Burke, of the Scott Company, who saw the lighter within a week after she was beached, described the likelihood that she could be saved as an "outside chance in which you would have to [fol. 27] have all the elements playing into your hands." And Capt. Price testified that, in his opinion there was one chance in a thousand of raising the vessel and Snow got it.

It appears that if Rowe had gone down to the "Cornelia" with equipment such as Snow employed he could have saved the vessel; but I do not think it can be said that the libellant is to be charged with inattention or negligence under the circumstances, or that the fact that the weather continued fair and the lighter was successfully raised by Snow, with apparent ease, prevents the libellant from recovering for the value of the vessel. Snow knew of Rowe's attempt and its result, and, in fact, his operations did not progress without a hitch, for when he had the vessel partially pumped

the swell from a passing destroyer caused her to jump around so that he had to let her sink and to renew his undertaking to get her up.

I determine, accordingly, that the libellant is entitled to recover for the value of the "Cornelia" at the time of the collision, which brings us to the question of her value at that time.

The Value of the "Cornelia"

As has been stated, the measure of damages for a total loss is the market value of the vessel.

The Baltimore, supra.

Roscoe on Damages, supra, p. 33, quoting the old saying that "the worth of a thing is the price it will fetch."

[fol. 28] A good statement of what is meant by "market value" is that of the Court in

"McCloskey v. The Achilles, 15 Fed. Case, 1277, 1278, Case No. 8701.

"The true question is what a prudent owner wishing but not compelled to sell would reasonably expect to get, and would probably be able to get within a reasonable time, at public auction or private sale, without forcing the sale and using proper measures to avoid undue sacrifice."

Cf. 26 Cyc, 819.

In The Colorado, Brown's Adm. Rpts., 411, 413, Judge Longyear said, after reference to the English cases:

"The best evidence of such value is the opinion of competent persons who knew the vessel shortly before she was lost, and the next best evidence is the opinion of persons conversant with shipping and the transfer of vessels."

But this does not preclude other evidence.

See Leonard v. Whitwell, 19 Fed. 547, 549, where Judge Addison Brown said:

"While it is undoubtedly true that the best single class of evidence of market value is the opinions of competent persons who knew the vessel and who knew the state of the market at the time of the loss, it does not follow in any

given case, because witnesses testify to certain facts, that either the commissioner or the court is shut up to their evidence without giving any heed to other kinds of evidence which may be offered."

[fol. 29] And when, on account of conditions or the character of the vessel, there is no market for her, it is said that the cost of reproduction less depreciation may be resorted to.

The Colorado, supra.
The Cushing, 292 Fed. 560, 567, C. C. A., 2nd Ct.
Roscoe, supra, and cases cited.

The last word on the subject is in the review by the Supreme Court of the case of The Cushing, supra, under the title:

Standard Oil v. Southern Pacific Co., 268 U. S. 146.

There, the Court said in an opinion by Mr. Justice Butler, at p. 155:

"It is fundamental in the law of damages that the injured party is entitled to compensation for the loss sustained. Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good position pecuniarily as if his property had not been destroyed. In case of total loss of a vessel, the measure of damages is its market value, if it has a market value, at the time of destruction.

"Where there is no market value such as is established by contemporaneous sales of like property in the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum [fol. 30] that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

"And by numerous decisions of this court, it is firmly established that the cost of reproduction as of the date of valuation constitutes evidence properly to be considered in the ascertainment of value.

"This same rule is applied in England.

"It is to be borne in mind that value is the thing to be found, and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

The sum total of the authorities seems to be that—at least under the peculiar conditions existing during the late war—all the facts and circumstances may be taken into consideration in determining value.

Cf. as to a case at law,

Woonsocket, etc. Co. v. N. Y., N. H. & H. R. R. Co., 239 Mass., 211, 214.

The war brought about an extraordinary increase in the value of American vessels, due to the great demand for tonnage and to the fact that after the United States entered the war the government exercised control over the shipyards of the country, and it was very difficult and at times impossible for owners to replace a vessel taken or sold, with the result that they were very loath to sell what they had and would not do so except for prices which were not heard of in [fol. 31] normal times.

But, as was said by the Court of Appeals in The Cushing, supra, p. 367, the prices "were brought about by unusual economic conditions," while it was not expected that they would survive indefinitely after the war "there was nothing artificial or fictitious about these prices." And they must be taken into consideration in determining the value of a vessel during the period. In fact, the prices rose and were maintained at a high level until 1920, in the latter part of which year they began to decline, and in 1921 fell rapidly.

Although the "Cornelia" was adapted to a particular use, she was a lighter of a type which could be utilized for various purposes. Further, lighters were scarce in 1918, and I find that there was a market for her at the time of the collision. Indeed, the Navy department undertook to requisition the vessel in June, 1918, at which time she was engaged on construction work of the government in Boston, but the libellant persuaded the authorities to take a smaller and slower vessel which it owned.

Inasmuch as I find that there was a market for the lighter, I rule that the cost price of the vessel, the figure at which she was carried on the books of the libellant, and the amount for which she was insured are not material or controlling as to her value. And the liability of the United States to respond in damages is not affected by the fact that the Insurance Company paid the amount of the insurance and has been subrogated to the rights of the assured.

L. Boyer's Sons Co. v. U. S. A., 195 Fed. 490, C. C. A. 2nd Ct.

The Ceylon Maru, 1925, A. M. C., 1605, 1608.

The question of the value of the vessel was tried at length and with great thoroughness by both sides, and there were numerous witnesses. Their evidence of value ran in [fol. 32] round figures from $40,000 to $110,000. Reproduction figures were given by some of the witnesses, and the testimony of all may be summarized as follows:

Witness	Value time of collision	Reproduction
Paul P. Bird	$90,000.	$150,000.
Sanuie Rowe	90,000. to $100,000.	150,000. to 155,000.
Wm. B. Price	90,000. to 95,000.	
Wm. F. Munroe	95,000.	
Arthur P. Friend	100,000.	
Philip H. Doyen	100,000.	200,000.
John I. Snow	100,000.	200,000.
B. Stewart Murphy	105,875.	137,500.
Wm. S. Nolan	40,000. to 50,000.	
Geo. C. Manning	40,279.80	93,673.60
John E. Lord	45,000.	102,000.

Mr. Murphy on further consideration raised his reproduction figure to $141,961, making his estimate of value approximately $110,000. And Lieut. Lord raised the reproduction figure stated by Lieut. Commander Manning to $102,000 because of items omitted by the Commander, from which the latter did not dissent. The last three of the witnesses in the list were called by the government, and the others by the libellant.

Mr. Bird was president of the libellant at the time of his testimony, and at the time of the collision was employed as an expert on the efficiency of the entire plant of the company. He testified that he stated in an affidavit, shortly after the collision, that the "Cornelia" was worth $90,000., so this figure may be taken as a contemporaneous expression of opinion in behalf of the owner of what was then her value.

Mr. Rowe was treasurer of the libellant at the time of his testimony and office superintendant at the time of the col- [fol. 33] lision. He testified that he based his estimate of the value of the lighter on the work she was doing and the demand for vessels. Asked by counsel for the government how he arrived at his figures, he later presented a statement which was introduced as libellant's Exhibit 22, as follows:

"Basis of the opinion of Mr. Sanie Rowe that the fair market value of the Cornelia on August 9, 1918, was $90,000 to $100,000.

"1. The fact that the government paid $50,000 for the lighter Hercules, which in witness's opinion would have brought about half as much as the Cornelia in the market.

"2. The fact that it would cost to construct the Cornelia at this time about $150,000 and shipyards were filled with work.

"3. The fact that it cost to construct the lighter Ajax at Portland, Maine, in the period about August 9, 1918 by using misfits from Shipping Board hulls and without any builder's profit $125,000, and that $110,000 was offered and refused for said lighter in 1920.

"4. The fact that the Cornelia was lost when market values of steamers were unusually high, and yet she sold on December 21, 1920 after the market had gone to pieces for $60,000.

[fol. 34] "5. The fact that the tugs Nathaniel P. Doane and Clara H. Doane were being built at this time at a cost price without builder's profit of $97,000 apiece.

"6. The fact that the tugs Astrea and Fame were being built at Fall River, Massachusetts, at this time at practically the same rate per ton as the two Doane boats.

"7. The fact that the tug James Woolley was taken by the United States government in July 1918 at $44,000 and

the Sadie Ross was taken by the United States government late in 1917 at $20,000.

"8. The fact that the demand for vessels of this type was so intense that age had very little effect on market value, and the Cornelia should have brought from three-fourths to seven-eighths as much as a new lighter.

"9. The fact that the Cornelia was a speedy steam lighter capable of doing more work in 24 hours than any lighter of similar type in the harbor of Boston.

"10. The fact that Cornelia had been used successfully in towing and could have been sold for coastwise towing purposes, for which there was an unusual demand at this time.

"11. Because a fair charter rate of the Cornelia at this time was $300 per day, and there was work for her every day of the year.

"12. Appendix A, taken from the list of Merchant vessels of the United States, gives data on all the above mentioned vessels.

[fol. 35]

Appendix A

Cornelia	285	103	128	30.9	1906	Noank, Conn.
Hercules	283	104	102.5	32.0	1906	Bath, Maine.
Ajax	536	197	133.8	29.7	1919	So. Portland, Maine.
Nathaniel F. Doane	96	43	87.4	29.2	1919	Boothbay.
Clara H. Doane	96	43	87.4	29.2	1919	Boothbay.
Astrea	415	197	142	31.6	1918	So. Somerset, Mass.
Fame	415	197	142	31.6	1918	So. Somerset, Mass.
James Woodley	92	45	86	18.6	1904	
Sadie Ross	69	27	90.5	18.6	1904	Boston

Capt. Price was a professional surveyor and appraiser of vessels and has appraised for the Court as well as for private parties. He knew and examined the "Cornelia" and was familiar with market conditions, and gave his opinion accordingly. He also referred specifically to the lighter Ajax, the Tugs Nathaniel and Clara Doane, and the Tug James Woodley, mentioned by Mr. Rowe.

Mr. Munroe was a ship broker. He said he could not testify to any sales of lighters but that he had inquiries for such vessels, including the "Cornelia," and that there was a market for them. He chartered the lighter for Mr. Snow and said he based his estimate on her value and earning capacity; that wooden hulls were selling in August, 1918, for $100 per dead weight ton, and that he thought the ves-

sel would earn $100 to $150 a day. He also had in mind Doane tugs and the James Woolley.

I find that the Ajax was a lighter a little larger than the "Cornelia," built at Portland, Maine, in 1919, from material that had been rejected by the Shipping Board because not [fol. 36] of proper size for the vessels that the Board was building. This material was acquired by the builder and owner of the Ajax, and as thus constructed she cost him $125,000. The tugs Nathaniel and Clara Doane were also built in 1919, and cost $97,000 each, and the tug James Woolley was taken by the government in July, 1918, for $45,000.

Mr. Friend described himself as a broker for ocean towing, buying and selling and chartering tugs, barges and steamers. He testified that he was familiar with the price of vessel property and the demand for boats for towing up and down the coast; that there was a scarcity of such vessels at the time of the collision, and that the "Cornelia" could have been used for the purpose and was then worth "not less" than the figure he gave.

Mr. Doven was a ship builder and built the Ajax. He testified that he was familiar with the market for lighters in August, 1918, and that the "Cornelia" could have been sold at that time.

Mr. Snow was the man who purchased, raised, repaired and afterwards sold the lighter.

Mr. Nolan gave his business as that of a ship broker, buying and selling all kinds of floating equipment. He knew the "Cornelia" and saw her as she lay aground at Fawn Bar, and said his estimate of her value was based on his general knowledge of vessels and transactions concerning them.

Whereas the reproduction figures of the witnesses previously referred to were more in the nature of rough estimates and their estimates of value were based upon their knowledge of the market, Mr. Murphy and Lieut. Commander Manning figured with some care the amount and cost of the material necessary to reproduce the "Cornelia," and [fol. 37] the item of labor, and, having thus arrived at the reproduction cost, depreciated it by a fixed method to arrive at the value of the vessel.

Mr. Murphy was a consulting engineer and marine surveyor and appraiser. After experience in ship yards in Wales he served as surveyor for Lloyd's in a number of places, including Boston, until 1914, when he went into business for himself. In 1918 he was appointed by the United States Shipping Board to the Ocean Advisory Committee, so called, which was organized to advise the Board what should be paid the owners for vessels seized by the Board or sunk while on its hands. The Committee devised a method for arriving at a fair price, which in the case of the smaller floating craft was as follows: After determining the reproduction cost of the vessel, the figure was depreciated at the rate of 2½ per cent a year for each year of the vessel's age, or one-half the normal deduction for depreciation of 5 per cent. For the first year the percentage was figured on the cost, and thereafter on the value as depreciated for the previous year. Murphy used this method with respect to the "Cornelia" and arrived at the figure given above as the value of the vessel at the time of the collision. He also referred to the cost price of wooden tow boats about 94 feet in length contracted for by the government in 1918, including 8 at $156,000 each, 6 at $152,600, 5 at $151,900, 3 at $133,900, 6 at $151,900, and 7 at $166,100. He said he thought the lighter would cost to build about 20 per cent less than a tow boat.

Lieut. Commander Manning was a graduate of the Naval Academy and at the time of his testimony attached to the Construction Corps of the Navy and in charge of the preparation of plans and estimates for all the construction work at the Charlestown Navy Yard, including the modernization of the battleships Florida and Utah. As the means of determining value of the "Cornelia," after arriving at her [fol. 38] reproduction cost, he used the formula adopted by the Joint Merchant Vessel Board, so called, which was composed of officers of the Army and Navy and appraised vessels taken over by their departments for the use of the United States. This method, in the case of vessels of the type of the lighter, was to depreciate the reproduction cost 4⅓ per cent a year for each year of the age of the vessel. As the lighter was 12 years old, this resulted in a depreciation of 57 per cent and an estimated value of 43 per cent of her reproduction cost as against 77 per cent in the case

of the formula used by Mr. Murphy. The Commander tabulated his estimates in a statement introduced as U. S. Exhibit Q, and he referred to six freight lighter hulls without power, capacity 250 tons, which were built at the Navy Yard in 1918 for $28,211 each. He thought that notwithstanding that the "Cornelia" was larger, she could have been built for the same price because of certain features of the construction of the Navy Yard lighters, and his estimate of the cost of reproducing the hull of the "Cornelia" was $31,793.60. He also mentioned some wooden harbor tugs 88 feet in length which the government had built in the latter part of 1918 and the first part of 1919 at the average cost of about $91,000.

Lieut. Lord at the time of his testimony was attached to the Charlestown Navy Yard as superintendent of the reconstruction of the frigate Constitution, and was referred to by Commander Manning as the outstanding wooden expert of the Navy. Lord went over the Commander's reproduction figures and raised them to $102,000, as has been stated, and judging from the work in which the lighter was engaged placed her value at $45,000.

The qualifications of Commander Manning are not to be questioned, though his experience was for the most part with steel vessels, and he made an excellent impression. But I think that his estimate of the cost of reproducing the [fol. 39] "Cornelia" was too low, and that an annual depreciation of 4¼ per cent in arriving at the value of the lighter was too much in view of the conditions brought about by the war, as a consequence of which the age of the vessel, if capable of service, had little effect upon her value as compared with normal times. Although the work of the lighter subjected both machinery and hull to hard usage, she was well kept up. The repair bill for the 12 months preceding August, 1918, amounted to $9,783.79, and I find that the vessel was in good condition and regularly employed at the time of the collision.

See the opinion in

Standard Oil Co. v. Southern Pac. Co., 268 U. S., supra, where the Court said, pp. 158 ff.:

"In August, 1918 the immediate demand for ships was greater than the supply; the shipyards were working to

full capacity; wages and prices were high; the trend of construction costs was upward and the element of time was of the utmost importance. The witnesses on both sides testified that such conditions make for a lower rate of depreciation to be taken into account in determining value * * * Plainly, conditions in 1918 justified a smaller deduction from cost of reproduction new than before the war, and made value of a vessel in good condition and ready for use approach more nearly its value new."

Mr. Murphy and Manning were in substantial agreement as to the amount of material necessary to reproduce the lighter. Their differences were largely over items of cost. The Commander got his prices from Navy sources as costs to the government in its own yards, that is, what it would cost the government to build, not what a builder would [fol. 40] charge a private client. In other words, he left out of consideration the private builder's risk and profit. It was admitted that the "Cornelia" could not have been rebuilt in a government yard, and therefore, so far as the cost of a new vessel was concerned it was the price that a private builder would charge.

Manning's estimate of the value of the "Cornelia" was less than the Navy Department paid for the Hercules, which was not so valuable a vessel, and less than the price which Snow got for the "Cornelia" in December, 1920, at a time when the market was not as good as it was in August, 1918. This is true, also, of the estimates of Lieut. Lord and Mr. Nolan. And it is to be noted further respecting the price for which the "Cornelia" when repaired was sold, that the fact that a wooden vessel has experienced a serious accident tends to depreciate her sale value. All of the expert witnesses testified that the pounding of a vessel on a hard bottom results in loosening the fastenings in such a way that it is difficult, and sometimes, impossible, to restore the vessel to her previous condition. As Mr. Snow graphically put it, the effect is to loosen everything, like a basket or an old chair. He said the "Cornelia" was a strongly built vessel, with excellent workmanship, and that he found no rotten wood in her except her bits, which did not amount to anything; but that whereas after he repaired her she was fairly tight, she would wring and twist all the time that he owned her.

The Hercules, like the "Cornelia," was a steam lighter and built the same year, but was smaller and of different design, having a length of only 102 feet, with a beam of 32 feet as compared with the Cornelia's length of 128 feet and beam of 30.9 feet. And she had a full bow, square bilges, and a scow stern. The result was that she was slower and less economical than the injured vessel. Sannie Rowe, who had the Hercules built before he became [fol. 41] connected with the libellant, and who, as libellant's office superintendent, oversaw the operation of both vessels, testified that the "Cornelia" would make two trips to the Hercules one and he thought was worth twice as much. The Hercules was appraised for the Navy as in "fair running condition" and worth $45,000, arrived at, it was assumed, by the same formula that Commander Manning used for his estimate of the value of the "Cornelia." And the government actually paid for the Hercules $50,000.

I attach great weight under the circumstances of the case to the testimony of the witnesses who knew the "Cornelia" and the state of the market at the time of the collision. Depreciating the cost of reproduction to determine value is merely a means to an end, and it appeared that different formulas were employed by different agencies of the government. Then the cost of reproduction had first to be determined, and under the conditions existing in August, 1918, that cost could only be approximated at best, and the estimates variously greatly. Finally, as the Supreme Court said in the Standard Oil case, "value is the thing to be found" and " is not a matter of formulas" but of "a reasonable judgment having its basis in a proper consideration of all relevant facts."

Finding on Value

I have endeavored to follow the direction of the Court, and on all evidence find that the value of the "Cornelia" at the time of the collision was $95,000.

Expenses

It is said that in addition to her value the owner of the injured vessel may recover "the necessary expenses of

raising her, when that is necessary to determine whether she can be repaired advantageously."
[fol. 42] The Reno, supra, at p. 556.

And the libellant presented the following bills:

Wm. B. Price	$25 00
Robert H. Fraser	35 00
Ross Tow Boat Co.	100 00
Boston Sand & Gravel Co.	350 00
The T. A. Scott Co.	132 18
Betts Bros. & Co.	442 50
	$1,084 68

The bills of Price and Fraser were for services as surveyors (Libellant's Exhibits 5 and 6). The bill of the Ross Tow Boat Co. I understand was for services rendered to Betts Bros. in connection with their work upon the "Cornelia" and was paid to Betts Bros. (Libellant's Exhibit 7). The bill of the Boston Sand & Gravel Co. was for 13¼ days' use of the lighter Reliance, Aug. 9 and 10, at $200 a day. (Libellant's Exhibit 8). The bill of the T. A. Scott Co. was for use of the 8 inch pump and for services of a diver and apparatus recovering suction lost overboard Aug. 9 and 10. (Libellant's Exhibit 9). And the bill of Betts Bros. & Co. was for services of tow boat, lighter and men on Aug. 9, tow boat on the 10th, tow boat, diver and crew on the 12th and 13th, and the trip to the sunken vessel on the 20th, the day of the survey. (Libellant's Exhibit 10).

All of the bills were made out to and paid by the Insurance Company with the exception of that of the Scott Co., which was made out to the libellant.

I find that the bills were incurred in the attempt to raise the vessel and to ascertain if she was worth raising, and as such are recoverable items of damage. The fact that most [fol. 43] of the expense was incurred directly by the Insurance Company it does not seem to me is of consequence. The owner was charged with the duty of minimizing the damages so far as it could, and the services charged for

were of the sort that could be secured to that end. I had some doubt at first whether the libellant's bill should be included, but as it relates to the use of a lighter which was necessary in the attempt to raise the vessel and would have had to be obtained elsewhere if not furnished by the libellant, I think the charge is proper.

Conclusion

To summarize, I determine that the amount of damages legally sustained by the libellant by reason of the collision was $96,084.68, made up as follows:

Value of the "Cornelia"	$95,000 00
Necessary expenses	1,084 68
	$96,084 68
I assume there must be deducted the sum received from the sale of the vessel	5,000 00
which leaves a balance of damages of	$91,084 68

By mandate of the Court of Appeals the libellant is to recover one half its damages, and I therefore conclude and report that the amount of the damages which the libellant is entitled to recover is $45,542.34. The allowance of interest I leave to the Court.

In re Great Lakes Dredge & Dock Co., 250 Fed. 916.

[fol. 44] I file herewith the stenographic record of the testimony before me, Volumes I-9, inc., and the exhibits, libellant's exhibits being numbered 1-22, inc. and the exhibits of the United States A to K, inc., there being two exhibits marked I.

All of which is respectfully submitted.

Fitz Henry Smith, Jr., Commissioner.

In United States District Court

Respondent's Exceptions to Commissioner's Report

Filed September 20, 1926

Now comes Harold P. Williams, United States Attorney, and George E. Farnum, Assistant United States Attor

ney, and on behalf of the respondent in the above entitled cause excepts to the report of the Commissioner filed herein and assigns as reasons therefor and enunciates as the particulars wherein the respondent is aggrieved and prejudiced, the following:

1st: The finding of the Commissioner that the libellant is entitled to recover for the value of the Cornelia at the time of the collision is unwarranted and without adequate support on the evidence.

2nd: The finding of the Commissioner in substance and effect that the Cornelia was a constructive total loss was unwarranted and without adequate support on the evidence.

[fol. 45] 3rd: The finding of the Commissioner in form, substance and effect that the libellant was not negligent in abandoning the Cornelia to the insurance company, was unwarranted and without adequate support on evidence.

4th: The finding in form, substance and effect by the Commissioner that the libellant made a reasonable effort to raise, repair and save the Cornelia, was unwarranted and without adequate support on the evidence.

5th: The finding of the Commissioner that the lighter was in an exposed place on dangerous bottom and likely to go to pieces in an easterly storm and the finding that the same was not controverted, was unwarranted and without adequate support on the evidence.

6th: The finding of the Commissioner that the collision took place when the conditions were unusual both as to the facilities for and the cost of raising and repairing a sunken vessel, so far as it has any application to the position of the libellant, was unwarranted and without adequate support on the evidence.

7th: The finding of the Commissioner in substance and effect that the libellant performed his duty in doing everything reasonable in order to minimize its damages, was unwarranted and without adequate support on the evidence.

8th: The finding of the Commissioner that the insurance company to whom the vessel was abandoned and for whose benefit the proceedings were brought, made reasonable efforts and did everything required to raised, repair and

save the vessel, was unwarranted and without adequate support on the evidence.

[fol. 46] 9th: In deciding the issue of the case involving the attempts to raise the Cornelia, the assessor ignored important material testimony and accorded to other testimony undue and unreasonable importance.

10th: The determination that the value of the Cornelia at the time in question was $95,000, was unwarranted and without adequate support on the evidence.

11th: The decision as to the value of the Cornelia at the time in question is excessive and exorbitant.

12th: The decision as to the value of the Cornelia at the time in question is grossly excessive and clearly exorbitant.

13th: The determination that the damages sustained by the libellant by reason of the Commissioner, $96,084.68 was unwarranted and without adequate support on the evidence.

14th: The conclusion and report that the amount of damages the libellant is entitled to recover is $45,542.34 was unwarranted and without adequate support on the evidence.

Wherefore, they pray that confirmination of the report be denied, and that these exceptions be sustained.

Harold P. Williams, United States Attorney. Geo. F. Farnum, Asst. United States Attorney.

[fol. 47] In United States District Court

Motion to Confirm Report of Assessor—Filed October 30, 1926

Now comes the libellant in the above entitled case and moves that the report of Fitz Henry Smith, Esq. now on file be confirmed, and that decree in accordance therewith be entered forthwith.

Boston Sand & Gravel Company, by Blodgett, Jones, Burnham & Bingham, Proctors.

In United States District Court

Motion Relative to Interest and Order Thereon—Filed October 30, 1926

Now comes the libellant in the above entitled case and moves that interest at the rate of 6% per annum be added to the various items of damages as found by the commissioner from the dates when said items accrued or were paid.

Boston Sand & Gravel Company, by Blodgett, Jones, Burnham & Bingham, Proctors.

[fol. 48] Feb. 23, 1927.

On the authority of Nantasket Beach Steamboat Co. vs. U. S. 297 Fed. 656, I rule that the libellant is not entitled to interest and therefore nunc pro tunc as of Dec. 21, 1926, I deny the above motion.

E. H. B., D. J.

In United States District Court

Minute Entry of Hearing

Also at the same term, to wit, November 1, 1926, said cause was set down for hearing on the commissioner's report and fully heard by the court, the Honorable Elisha H. Brewster, District Judge, sitting.

Said cause was thence taken under advisement to the present December Term, A. D., 1926, when, to wit, December 13, 1926, an opinion of the court is announced, overruling exceptions to Commissioner's Report and confirming the report.

In United States District Court

Final Decree on Mandate—December 21, 1926

Brewster, J.:

A mandate having been received from the Circuit Court of Appeals in said cause and entered, reversing the final

decree in this case entered on July 30, 1924 with costs to the appellant-libellant, and this cause having been heard on the pleadings and proofs and having been argued and submitted by the proctors for the respective parties, and the Circuit Court of Appeals having found in its opinion dated July 7, 1925, that the damages of the libellant Boston Sand & Gravel Company were caused by the fault of both the [fol. 49] libellant and the respondent, it is therefore, in accordance with said opinion, the mandate, the interlocutory decree now on file and the report of Fitz Henry Smith, Jr., commissioner on damages, and confirmation thereof by this court, now, to wit, December 21st, 1926

Ordered, adjudged and decreed that the respondent pay to the libellant or its proctors of record one-half of the libellant's damages, said one-half damages being the sum of $45,542.34; also one half of its costs in the United States district Court, the said one-half costs being the sum of $40.86, together with full costs in the Circuit Court of Appeals in the amount of $428.45; total $46,920.65.

By the Court.

Frank H. Mason, Deputy Clerk.

Notice of hearing on entry of this decree is hereby waived without prejudice to right of appeal.

George R. Farnum, Acting U. S. Atty., Proctor for Respondent. Blodgett, Jones, Burnham & Bingham, F. M. Murphy, Proctors for Libellant.

In United States District Court

Minute Entry of Appeals

From the foregoing final decree both the United States of America and the Boston Sand & Gravel Company claim appeals to the United States Circuit Court of Appeals for the First Circuit, and said Boston Sand & Gravel Company having given good and sufficient security to prosecute its appeal to effect and answer all costs if it fail to make its plea good, said appeals are allowed accordingly.

[fol. 50] IN UNITED STATES DISTRICT COURT

OPINION—December 13, 1926

BREWSTER, J.:

The libel in this cause was brought under Special Act of Congress (42 Stat. 1590) to recover damages resulting from a collision between the United States destroyer "Bell" and the steam lighter "Cornelia," which occurred August 9, 1918, in Boston Harbor. The Circuit Court of Appeals on appeal found both the Bell and the Cornelia at fault and decreed divided damages. 7 Fed. (2d) 278. The libel was referred to Fitz Henry Smith, Jr., Esq., as commissioner, to determine the amount of damages and to report thereon to this Court. He has fixed the damages at $91,084.68 and reports that the libellant is entitled to recover $45,542.34.

The cause comes before the Court upon libellee's exceptions thereto and libellant's motion to have the report confirmed. Libellee assigns numerous grounds upon which it bases its exceptions. These may be grouped under two heads:

First. Those relating to the finding of the commissioner that the Cornelia was a constructive total loss.

Second. Those relating to the finding of the commissioner that, at the time of the collision, the value of the Cornelia was $95,000.

In his report the commissioner fully considers the evidence upon which he bases both of these findings. Respecting the finding that the Cornelia was a constructive total loss, it appears that soon after the collision the lighter was beached on what is known as "Faun Bar" outside of Deer Island. At high tide her deck was three or four feet under water. The bottom of the harbor at that point was full of bowlders of various sizes, some being as large as six or [fol. 51] seven feet high. The libellant carried insurance on the vessel and it abandoned her to the insurance company which, in turn, sold the wreck as it lay on the bottom for $5,000. The commissioner awarded the damages according to the rule of damages obtaining in cases of total

loss crediting, however, to the value of the vessel at the time of the collision the sum of $5,000 received from the sale of the wreck.

If it could be said that the Cornelia was a total loss, actual or constructive, the measure of damages adopted by the commissioner was the correct one. Smith et al. v. Condry, 1 How. 28, 11 L. Ed. 35; The Ann Caroline, 2 Wall. 538, 17 L. Ed. 833; The Baltimore, 8 Wall. 377, 19 L. Ed. 463; The Reno, 134 Fed. 555.

It does not necessarily follow, however, that because the Cornelia sank as a result of the collision this rule of damages is to be applied. The Admiralty Law casts upon the owner a duty to exercise reasonable care and attention to minimize the loss. He is required to make reasonable efforts to ascertain whether the vessel can be saved and if, as a result of such efforts, he finds that it is reasonably possible to salvage her, and that the expense of raising and restoring would not exceed her value when restored, the owner would not be justified in abandoning the vessel and exacting full compensation for her value. The Baltimore, supra; The Reno, supra; The Ernest A. Hamill, 100 Fed. 569; The Havilah, 50 Fed. 331.

It is the contention of the libellee that the owner did not exercise the reasonable care and diligence required of it in its endeavors to avoid a total loss.

It appears from the findings of the commissioner, which are abundantly supported by the testimony, that the officers of the libellant company visited the Cornelia on the day of the collision and, believing that she could be easily floated, they arranged for the patching of the hole in her bow which had been made by the Bell; hired a pump, and on the even- [fol. 52] ing of the same day, at low water, the marine superintendent of libellant undertook to get her afloat. After working two hours, it was found that water was coming in about as fast as it was being pumped out, and further efforts were suspended, to be renewed the following morning.

On the next morning the superintendent found, on arriving at the wreck, that the wind had turned east and that a sea was running, rendering it impossible to continue his operations. Parts of the afterhouse had been washed

away, and it then seemed to the superintendent that the vessel was pulling apart amidships and, in view of the fact that she was resting upon bowlders, he reached the conclusion that she would be damaged to such an extent that the cost of raising and repairing would be more than she would be worth. Furthermore, an agent for the insurance company had investigated, a diver had made an examination of the hull and had reported unfavorably, appraisers had examined the vessel, with the ultimate result that both the libellant and the insurance company had come to the conclusion that the cost of raising and repairing the vessel would exceed her value when restored. Both the libellant and the insurance company had endeavored to obtain wrecking companies to undertake the raising of the Cornelia but had not been successful in finding anyone to undertake it. The commissioner found that these wrecking companies were the only available concerns that were equipped to do that work.

Thereafter the insurance company sold the Cornelia for $5,000, as above stated. The purchaser had the necessary equipment for raising. His first attempt was not successful, but later, with comparatively little difficulty, he succeeded in getting the Cornelia afloat and she was towed to a dock in Boston, and after slight repairs were there made, she was taken to the purchaser's plant in Rockland, Maine, when she was completely overhauled at an expense of over [fol. 53] $20,000. Two years later she was sold for $60,000. In the light of subsequent events it is doubtless true that the marine superintendent, the diver and the appraisers, all of whom advised that the cost of floating and restoring the vessel would exceed her worth when restored, were probably in error, or at least unduly pessimistic, but the evidence clearly warrants the commissioner's findings on the question of negligence, which, although stated negatively, I read to import a finding that the libellant, under the circumstances as presented at the time, acted with reasonable diligence in its efforts to prevent a total loss.

Furthermore, the unsuccessful attempts on the part of the libellant and insurance company to induce available wrecking companies to undertake the salvage warrants a

finding of constructive total loss. La Normandie, 58 Fed. 427; Hughes on Admiralty, page 327.

As to the amount of damages, the commissioner followed the rule recently laid down in our Supreme Court and sought to find from all the evidence that value of the vessel which would be represented by "the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy." Standard Oil Co. v. Southern Pacific Co. 268 U. S. 146.

His report contains an adequate summary of the evidence considered relating to the original cost of the Cornelia; her reproduction value new; the rate of depreciation; contemporaneous sales of similar vessels; costs at that time of constructing other lighters and tugs of approximate similar construction and equipment; the condition of the market as to supply and demand and also of the testimony of the owner and experts who had seen the Cornelia and who gave opinion evidence as to her value. [fol. 54] It is a notorious fact that in the summer of 1918 prices for sea going craft reached abnormal heights. The Court, in Standard Oil v. Southern Pacific Co., supra, took occasion to observe that when the "demand for ships was greater than the supply; the shipyards were working to full capacity; wages and prices were high."

The commissioner, in his report, says:

"I attach great weight under the circumstances of the case to the testimony of the witnesses who knew the "Cornelia" and the state of the market at the time of the collision. * * * Finally, as the Supreme Court said in the Standard Oil case, "value is the thing to be found" and "is not a matter of formulas" but of "a reasonable judgment having its basis in a proper consideration of all relevant facts." * * * I have endeavored to follow the direction of the Court, and on all the evidence find that the value of the "Cornelia" at the time of the collision was $95,000."

I have carefully examined all the evidence submitted to the commissioner. I do not deem it necessary to review

that evidence in this opinion. I am convinced that the evidence abundantly warrants his findings of fact and that his findings fully justify the conclusion which he has reached respecting the value of the Cornelia at the time of the accident.

Since the commissioner adopted a proper rule of damage and proceeded along correct lines in determining the extent of that damage, and, inasmuch as his conclusions are adequately supported by the evidence, his report must be confirmed and the libellee's exceptions overruled. I so order and decrees may be entered accordingly.

[fol. 55] IN UNITED STATES DISTRICT COURT

PETITION OF THE UNITED STATES FOR APPEAL.—Filed February 11, 1927

The United States being aggrieved by the decree, dated December 21, 1926, rulings and findings of the United States District Court therein, claims an appeal from said decree, rulings and findings, and prays that its said appeal may be allowed.

United States of America, By Frederick H. Tarr, United States Attorney.

February 15, 1927.
Petition for appeal allowed:
Elisha H. Brewster, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS OF THE UNITED STATES—Filed February 11, 1927

Now comes the United States of America by Frederick H. Tarr, United States Attorney, in the above entitled case, and having claimed an appeal to the Circuit Court of Appeals for the First Circuit from the final decree entered in the District Court on December 21, 1926, files these its assignments of error.

The court erred:

1. In confirming the report on damages filed by the Commissioner.

[fol. 56] 2. In finding that libelant made a reasonable effort to save the Cornelia.

3. In holding that the Cornelia was a total loss.

4. In finding that the value of the Cornelia was $95,000.

5. In not finding that the Cornelia could have been and should have been raised and repaired by the libelant.

6. In not finding that the libelant was negligent in efforts to minimize the damages.

7. In finding that libelant was justified in abandoning the Cornelia to the underwriters as a total loss.

8. In finding that the insurance company to whom the Cornelia was abandoned made reasonable efforts and did everything required to raise and repair the vessel.

9. In finding that libelant is entitled to recover for the value of the Cornelia at the time of the collision.

10. In finding that the Cornelia was in an exposed place on dangerous bottom and likely to go to pieces in an easterly storm and that such was not controverted.

11. In finding that the collision took place when conditions were unusual both as to facilities for and the cost of raising and repairing a sunken vessel.

12. In overruling each and every exception filed by the United States to the Commissioner's report.

[fol. 57] 13. In finding that the damages sustained by libelant arising out of the collision amounted to $96,084.68.

14. In finding that libelant should recover damages in the sum of $45,542.34.

United States of America, by Frederick H. Tarr, United States Attorney.

In United States District Court

Petition of the Boston Sand & Gravel Company for Appeal—Filed March 3, 1927

The libellant, Boston Sand & Gravel Company, being aggrieved by the decree of the United States District Court

herein, dated December 21, 1926, in not allowing interest and full costs to the libellant and by its ruling denying libellant's motion for interest, on the ground that the Court is unauthorized to allow it, claims an appeal from said ruling and decree upon said questions of interest and costs and prays that its said appeal may be allowed.

Boston Sand & Gravel Company, by Blodgett, Jones, Burnham & Bingham, Proctors.

March 3, 1927.

Libellant's petition for appeal allowed. Elisha H. Brewster, U. S. District Judge.

[fol. 58] In United States District Court

Assignment of Errors of the Boston Sand & Gravel Company—Filed March 3, 1927

Now comes the libellant, Boston Sand & Gravel Company, and having petitioned and appealed to the Circuit Court of Appeals for the First Circuit from the ruling on the libellant's motion for interest and the final decree entered in the District Court on December 21, 1926, files these its assignments of error.

The Court erred:

1. In disallowing motion of libellant for interest on the ground that the Court is unauthorized to allow it.

2. In entering decree without allowing the libellant interest.

3. In not holding that interest is allowable to the libellant under the Enabling Act (p. 4 of the original record in the Circuit Court of Appeals).

4. In ruling that the libellant is not entitled to interest and denying the libellant's motion for interest on the authority of Nantasket Beach Steamship Company vs. United States, 297 Fed. 656.

5. In not awarding full costs to the libellant where the libellant only brought suit and recovered half damages.

Boston Sand & Gravel Company, by Blodgett, Jones, Burnham & Bingham, Proctors.

[fols. 59-63] Bond on appeal for $250.00 approved and filed March 3, 1927, omitted in printing.

[fols. 64 & 65] Citation, in usual form, showing service on Frederick H. Tarr, omitted in printing.

[fol. 66] In United States District Court

Stipulation re Transcript of Record—Filed March 21, 1927

It is hereby agreed in the above entitled cause that the order on the praecipe heretofore made may be vacated, and that the foregoing, with the exception of the petition for appeal filed by the United States of America and order thereon, assignments of errors filed by the United States of America and said praecipe and order thereon, shall constitute the record on appeal of the Boston Sand & Gravel Company; and it is further agreed that the printed record of this case in the Circuit Court of Appeals, No. 1826 of the October Term, 1924 may be submitted in the original form to the Circuit Court of Appeals unattached to the record of the case.

Blodgett, Jones, Burnham & Bingham, Proctors for Libellant appellant. Frederick H. Tarr, Proctor for Respondent appellee.

Mar. 21, 1927. So ordered: E. H. B., D. J.

[fols. 67 & 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] In United States Circuit Court of Appeals for the First Circuit, October Term, 1926

No. 2118

Boston Sand & Gravel Company, Libellant, Appellant

v.

United States of America, Respondent, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Johnson and Anderson, JJ.

Opinion—June 4, 1927

Anderson, J.:

The main question in this admiralty appeal is whether the United States is liable for interest on damages awarded under a special act not specifically providing for interest. The appellant filed on May 29, 1922, a libel to recover damages arising out of a collision of the United States Government Destroyer Bell with the Cornelia, on August 9, 1918, in Broad Sound Channel in Boston Harbor. On appeal from a finding in favor of the Government, this court held, 7 Fed. (2d) 278, both vessels at fault and that the damages to the vessels should be divided. On proceedings pursuant to the mandate, the court below, affirming a finding of the Commissioner, entered judgment for the libellant for $45,542.34, one-half the damages without interest, and for one-half the costs in that court. By this appeal the appellant [fol. 70] seeks to recover interest at 6 per cent from the date of the collision, and full costs. The suit is brought under a special act of May 15, 1922, 42 Stat. 1590, which reads:

"That the claim of the owner of the steam lighter Cornelia arising out of a collision between said steam lighter and the United States Destroyer Bell in Broad Sound, Boston Harbor, Massachusetts, on the ninth day of August, 1918, for and on account of the losses alleged to have been suffered in said collision by the owner of said steam lighter

Cornelia by reason of damages to or the loss of said steam lighter, her boats, engines, boilers, tackle, apparel, furniture and supplies, may be submitted to the United States Court for the District of Massachusetts, under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs as in like cases in admiralty between private parties with the same rights of appeal: Provided, that such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States; Provided, further: That said suit shall be brought and commenced within four months of the date of the passage of this Act."

The appellant's chief reliance is a decision by the Court of Appeals for the Second Circuit, dated January 10, 1927, —New York & Cuba Mail S. S. Co. v. United States, 16 Fed. (2d) 945, 947. In that case, that learned court, construing the special act of February 28, 1923, 42 Stat. 1378, which mutatis mutandis is identical with the Act here in question, sustained the claim for interest, overruling the court below. The grounds of that decision appear in the following excerpt from the opinion of Circuit Judge Manton:

"By the authority of the statute, the appellee may maintain its libel, as it would between private parties. In a suit between private parties in admiralty growing out of collision, it has long been settled that interest is awarded as [fol. 71] a part of the measure of damages. The object of the award of damages is to place the injured party in the same pecuniary position as he would have been in but for the collision.

"This principle has been referred to in admiralty as that of the right to a full and complete indemnity. The phrase the legal 'damages * * * found to be due * * *

upon the same principles and measures of liability as in like cases in admiralty between private parties,' when given the interpretation intended by Congress in this enactment, included an award of interest, as is allowed in the case of a litigation between private parties in admiralty. The United States is not liable to pay interest in the absence of a statutory provision to that effect, except where it has contracted to pay, or where the United States submits itself to the jurisdiction of the court, or, if sued, places itself in the position of a private party. United States v. Thekla, 266 U. S. 340, 45 S. Ct., 112, 69 L. Ed. 313. Interest may be provided for by the name of legal damages. Congress has done so in granting this relief to private parties, where a vessel has been injured in collision with a public vessel. We must give to the language employed its ordinary and accepted meaning. We must presume that Congress intended that the principle of restitutio in integrum should be applied, as it is in cases in admiralty of like nature between private parties. In The Paquete Habana, 189 U. S. 453, 23 S. Ct. 593, 47 L. Ed. 900; Nuestra Senora de Regla, 108 U. S. 92, 2 S. Ct. 287, 27 L. Ed. 662

"In U. S. ex. rel. Angarica v. Bayard, 127 U. S. 251, 8 S. Ct. 1156, 32 L. Ed. 159, interest was disallowed, and this, because interest is not collectible against the government, except where the government stipulates to pay interest, or where interest is given expressly by an act of Congress, either by the name of interest or by that of damages. That case is distinguishable because there was no such exception. In Seaboard Air Line Ry. v. United States, 261 U. S. 299, 43 S. Ct. 354, 67 L. Ed. 664, the Supreme Court pointed out the exception within the doctrine of the Angarica case, where a statute employed terms so comprehensive as to require allowance of interest, and allowed interest as just compensation. The present act of Congress, upon which this libel is maintainable, provides for the jurisdiction, adjudication of conflicting claims of the government and a citizen, and requires such adjudication, including the measure of damages, to be made in the same legal method as private controversies are adjudicated. The intention of [fol. 72] Congress is clear and explicit to grant full in-

demnity in the award against the United States, if any is made. Indemnity is not complete without interest. The admiralty courts in suits against private persons have always followed this rule. We think Congress intended that it should be followed in this instance."

We agree with that court that the question is purely one of statutory construction; what was the intent of Congress? The difficulty we find in according with the conclusion there reached is grounded in large part on the history of analogous legislation.

We start with the well-settled principle that the United States is not liable to pay interest on claims against it, in the absence of a plain statutory provision to that effect. In United States v. Bayard, 127 U. S. 251, 260, the court said:

"It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."

In this Circuit there are two well-considered decisions, prior to this case, in which District Judges have held interest not recoverable under conditions indistinguishable from those now before us: The first is Pennell v. United States (D. C.), 162 Fed. 75, a decision by Judge Hale; and the second is by Judge Brewster in Nantasket Beach Steamboat Co. v. United States, 297 Fed. 636.

The next step in determining the intent of Congress, and a very important one, was the passage on March 9, 1920, of

"An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing, for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes." 41 Sts. 525.

This legislation recognizes the Government's new situation as the effective owner or operator of merchant vessels

[fol. 73] on the high seas. The Act provides that such Government vessels and their cargoes shall be exempt from seizure; but that libels in personam may be brought against the Government, very much as against private parties. For present purposes, the provisions in § 3 are significant. That section provides:

"That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for money judgment, interest at the rate of 4 percentum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court."

This Act was obviously intended to provide generally for the Government's obligations as effective owner and operator of merchant vessels or tugs, but did not cover naval vessels. The result was that numerous special acts were passed covering the Government's possible liability for collisions with its naval vessels. These acts are, mutatis mutandis, identical with the Act under which the present suit was brought. Compare Act of February 28, 1923, 42 Stat. 1378, for the relief of owners of the steamship Esperanza; Act of May 15, 1922, 42 Stat. 1589, for the relief of the owners of the Horatio G. Foss.

The next important indication of the intention of Congress as to the payment of interest on damages arising out of its statutory liability in admiralty, is found in the Act of March 3, 1925, 43 Sts. 1112.

That Act is entitled:

"An Act authorizing suits against the United States in admiralty for damage caused by, and salvage services rendered to, public vessels belonging to the United States, and for other purposes."

In § 2 is the following:

"Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled 'An Act authorizing [fol. 74] suits against the United States in admiralty, suits

for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes,' approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest."

Here is an express provision that the United States shall not be liable for interest in cases arising from collisions with public or naval vessels, like the one now at bar, until judgment is rendered.

We are faced then with this question: Did Congress, when it passed these numerous private acts to relieve parties who alleged that they had suffered injury from collisions with naval vessels, intend to give successful litigants in such suits interest at 6 per cent, when, under the Act of 1920, covering collisions with merchant vessels, interest was limited to 4 per cent, to "run as ordered by the court?" We cannot think that Congress under these private acts intended to give a more generous remedy to the parties injured by such collisions with naval vessels than were available to those bringing suits under the General Act of 1920.

Apparently the court in the Second Circuit reached its conclusion as to the construction of these private acts without having its attention directed to the provision as to interest in the general act of 1920. To our minds, this provision in the general act is far more significant as to the purpose of Congress than is the somewhat general (and not unambiguous) language used in all these special acts,—language undistinguishable from that which Judge Hale and Judge Brewster held inadequate to overcome the inference that Congress had not expressed a clear purpose to subject the Government to the payment of interest.

Perhaps some, although not great, additional light is thrown upon the Congressional purpose by the brief discussion in the Senate on February 16, 1926, 69th Congress, [fols. 75&76] First Session, Congressional Record, pp. 3751, 3752. At that time Congress was considering like private bills for the relief of the owners of vessels injured in col-

lision with public vessels of the United States. But it appeared that, on report from the Committee on Claims, the bill, as originally drafted, had been amended by striking out after the word "damages" the words "including interest." Several of these bills were then before the Senate, and Senator King inquired (p. 3753):

"Do I understand that the interest provision has been stricken out of the bills which have just been passed, so that the judgments will not bear interest?

Mr. Copeland: Yes. The words 'including interest' were stricken out of the bills."

In argument it is stated that there is a very large number of such private acts and many millions claimed. Under these conditions, a decision by the Supreme Court will doubtless, and appropriately, be sought.

A minor contention of the appellant is of error by the court below in awarding only one-half costs. It is conceded that costs are within the discretion of the court. But it is stated that in this case, in the office of the appellant's counsel, the decree was inadvertently drawn, dividing both the damages and the costs; so that the court below did not exercise its discretion or have the rule in this circuit brought to its attention. Clearly, counsel for the appellant is correct in his contention as to the general rule in this Circuit; Penn. R. R. Co. v. Golden, 243 Fed. 256, 258, and cases cited; The Baltimore, 283 Fed. 728, 731.

Under these circumstances, we think this merely inadvertent error should be corrected in this court. Accordingly the judgment below must be affirmed as to damages, but with full costs in the court below to the appellant. In this court, under the circumstances, the Government is entitled to its costs.

The decree of the District Court is modified to include full costs for the libellant, appellant, and so modified is affirmed; the appellee recovers costs in this court.

[fols. 77 & 78] In United States Circuit Court of Appeals for the First Circuit

[Title omitted]

Boston, Mass., June 15, 1927.

Notice of within petition is hereby accepted and delivery of a copy of the same is hereby acknowledged on behalf of the United States of America.

A. Chesley York, Assistant U. S. Attorney.

[fol. 79] In United States Circuit Court of Appeals

[Title omitted]

Petition for Rehearing

To the Honorable the Chief Justice and Associate Justices of the United States Circuit Court of Appeals for the First Circuit:

The petition of Boston Sand & Gravel Company respectfully prays for an order for a reargument and rehearing in the above entitled cause solely on the question of interest for the following reasons:

[fol. 80] First

Subsequent to the argument of the cause in this court petitions for writs of certiorari filed by the United States of America in the United States Supreme Court in two cases in which interest was allowed to the libellant by the circuit court of appeals for the second circuit under special acts identical with the act in the present case, have been denied.

In its brief the libellant cited and relied upon the cases of New York & Cuba Mail S. S. Co. vs. United States, 16 Fed. 2nd 945, (Libellant's Brief, page 14), and Texas Co. vs. United States, 16 Fed. 2nd 948, (Libellant's Brief, page 16), two decisions by the Circuit Court of Appeals for the Second Circuit, in which interest at the rate of six

per cent (6%) per annum was allowed to the libellant, in each instance under a special Act of Congress identical in phraseology with the special Act under which the present suit has been brought. (See Opinion, page 2 and Appellant's Brief, pages 27 and 28.

The United States of America petitioned for writs of certiorari in these cases, which petitions were pending when the present case was argued in the Circuit Court of Appeals for the First Circuit on April 29, 1927. On May 31, 1927, the United States Supreme Court denied the petitions in cases docketed Nos. 1064, 1065, and 1055 respectively, (certified copies of orders denying same are hereto annexed marked "A," "A1" and "B"); and on June 2, 1927, the decision in the present case came down from this Court.

Referring to cases in the United States Supreme Court [fol. 81] on petitions for certiorari, Mr. Chief Justice Taft in a statement made June 8, 1927, said:

"A very great error has crept into the mind of the public and of the bar in an assumption that the examination of cases upon application for certioraris (that is an examination to determine whether the cases are important enough to come into the court) is arbitrary without examination and submitted to the discretion of one member of the court.

Nothing could be further from the fact. * * *

The examination of the briefs and records and petitions for certiorari in those cases were not mere superficial glances at the petitions but they involved a real examination of each case."

The case was called by the Chief Justice, a resume made of the result of the examination of the briefs and record which each member of the court had made, the case was disposed of and then voted upon, and if four members of the court voted to allow the case to come in for consideration on its merits, the writ of certiorari was granted. (The United States Daily, June 9, 1927, page 2.)

That the petitions for writs of certiorari in the Second Circuit cases referred to were denied notwithstanding that the United States Supreme Court knew that the question presented was an important one, is apparent, as the United States in its petition in the New York & Cuba Mail Steam-

[fol. 82] ship Company case (page 4) gives as one of its reasons for granting a writ of certiorari.

"The question is an important one to be decided by this Court. Approximately 140 libels filed by authority of Private Acts, demanding damages of $5,000,000, are pending in the District Courts; 142 additional libels, demanding over $3,650,000, have been filed in the Bering Sea cases where the losses occurred during the years 1886-1896. Of these, approximately 30 have been tried and decrees, without interest, have been entered and paid. The cases for the most part relate to collision losses with public vessels which have occurred during the war period—1917-1919."

In short, the denial of certiorari, in these cases may be taken as an expression of opinion by the United States Supreme Court as to the merits of the cases.

It is apparent from the opinion that the denial of the petitions for writs of certiorari in the two Second Circuit cases was not known by this Court and we submit that the denial of the petitions is sufficient indication of the views of the United States Supreme Court to warrant this Circuit Court of Appeals allowing interest to the libellant in the present case.

[fol. 83] Second

The Texas Company vs. United States decision in the Circuit Court of Appeals for the Second Circuit was apparently not considered by this court.

Although the libellant in its brief specifically referred to and relied upon the case of Texas Co. vs. United States, 16 Fed. 2nd 948, (Libellant's Brief, page 16) it is stated in the opinion that the appellant's chief reliance is a decision by the Circuit Court of Appeals for the Second Circuit, referring to New York & Cuba Mail S. S. Co. vs. United States. The other decision by the same court in which interest was allowed was not referred to in the opinion of this Court.

Third

The act of March 9, 1920, upon which this court relies to disallow interest actually has an opposite application to the present case.

The decisions under this Act of March 9, 1920, cited by the libellant in its brief, (p. 17) allow interest from the inception of the cause of action at four per cent (4%) per annum,

Middleton vs. United States, 286 Fed. 548.
United States vs. Certain Subfreights Due the Neponset, 4 Fed. 2nd 132, D. Ct., Mass.

[fol. 84] which is an indication of the intent of Congress to allow interest, and this Court can make the interest rate four per cent (4%) or six per cent (6%) at its discretion.

Fourth

The discussion in Congress referred to by this court in its opinion (pages 6 and 7) is not pertinent to the question of allowance of interest under the special act in the present case.

In the trial of the present case no evidence of this discussion was introduced. It concerned an entirely different special Act. The petitioner submits that this discussion in the Senate concerning another Act has no bearing on the intent of Congress as to the allowance of interest when it passed the special Act in the present case. The discussion took place on February 23, 1926, nearly four years after the passage of the special Act under which the present suit is brought. There was no striking out of the word "interest" in the present Act as was done in that case. Congress has given consideration to the facts occasioning various acts seeking admiralty relief and in some cases has specifically allowed interest, and in other cases has passed upon the merits and given relief in a stated amount. For particular instances where interest has been specifically included see:

(a) 43 Stat., Part 2, page 1369, June 3, 1924 (affording relief to Colonial Navigation Company, owner of S. S. Lexington.)

[fol. 85] (b) 43 Stat. Part 4, page 1374, June 7, 1924, (affording relief to Thompson-Vache Boat Co., owner of S. S. Floyd.

(c) 43 Stat. Part 2, page 1589, March 3, 1925, (affording relief to Mallory Steamship Company, owner of S. S. Neuces, although the collision occurred 17 years prior to the Act.)

In short, no intent of Congress as to the allowance of interest can be found in a discussion in Congress except its intent as to the particular Act under consideration.

Blodgett, Jones, Burnham & Bingham, Proctors for Boston Sand & Gravel Company, Libellant, Appellant, Petitioner. Foye M. Murphy, Edward A. Neiley, of Counsel.

I, Foye M. Murphy, of counsel for Boston Sand & Gravel Company, do hereby certify that in my opinion the above petition is well founded.

Foye M. Murphy.

[fol. 86] Supreme Court of the United States, October Term, 1926

No. 1064

The United States of America, Petitioner,

v.

New York and Cuba Mail Steamship Company, as Owner of the Steamship "Esperanza"

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petition be, and the same is hereby, denied.

May 31, 1927.

A true copy.

Test:

Charles Elmore Cropley, Clerk of the Supreme Court of the United States. (Seal.)

[fol. 87] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1926

No. 1065

THE UNITED STATES OF AMERICA, as Owner of the Torpedo Boat Destroyer "Connor," Petitioner,

v.

STEAMSHIP "ESPERANZA," etc., NEW YORK AND CUBA MAIL STEAMSHIP COMPANY

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petition be, and the same is hereby, denied.

May 31, 1927.

A true copy.

Test:

Charles Elmore Cropley, Clerk of the Supreme Court of the United States. (Seal.)

[fol. 88] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1926

No. 1055

THE UNITED STATES OF AMERICA, Owner of the Steamship "Frederich Der Grosse," Petitioner,

v.

THE TEXAS COMPANY, Owner of the Steamship "Texas"

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the

Second Circuit, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petition be, and the same is hereby, denied.

May 31, 1927.

A true copy.

Test:

Charles Elmore Cropley, Clerk of the Supreme Court of the United States. (Seal.)

[fols. 89 & 90] In United States Circuit Court of Appeals

Final Decree—June 4, 1927

This cause came on to be heard April 29, 1927, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel:

Upon consideration whereof, it is now, to wit, June 4, 1927, here ordered, adjudged and decreed as follows: The decree of the District Court is modified to include full costs for the libellant, appellant, and so modified is affirmed; the appellee recovers costs in this court.

By the Court.

Arthur I. Charron, Clerk.

In United States Circuit Court of Appeals

Order Denying Rehearing—June 28, 1927

No judge who concurred in the decree entered June 4, 1927, desiring a rehearing, it is ordered that the petition for rehearing filed June 15, 1927, be, and the same hereby is, denied.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on August 5, 1927, mandate is issued to the District Court.

Clerk's certificate to foregoing transcript, omitted in printing.

[fol. 91] In United States Circuit Court of Appeals

Stipulation re Transcript of Record—Filed September 14, 1927

It is hereby stipulated and agreed in the above-entitled case, that whereas the printed record of the case in the Circuit Court of Appeals, No. 1826 of the October Term, 1924, contains no matter material to the issues involved in appellant's petition for writ of certiorari, all matter material to said issues being incorporated in the volume herewith submitted, pages 1 to 90, inclusive, said latter shall constitute the sole record accompanying said petition for writ of certiorari.

Foye M. Murphy, Blodgett, Jones, Burnham & Bingham, Proctors for Petitioner. For the United States, A. Chesley York, Assistant U. S. Attorney, Proctor for Respondent.

Certificate to foregoing paper omitted in printing.

[fol. 92] Supreme Court of the United States

Order Allowing Certiorari—Filed November 21, 1927.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.